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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARK ARMENDARIZ, Plaintiff and Respondent, v. CITY OF BURBANK, Defendant and Appellant.	B263960 (Los Angeles County Super. Ct. No. BC545816)

Appeal from an order of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Burbank City Attorney's Office, Amelia Ann Albano, City Attorney and Charmaine Jackson, Senior Assistant City Attorney for Defendant and Appellant.

Law Offices of Gregory W. Smith, Gregory W. Smith and Diana Wang Wells; Christopher Brizzolara; Benedon & Serlin, Douglas G. Benedon and Wendy S. Albers, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant City of Burbank (the City) appeals from an order of the trial court denying its special motion to strike a complaint under Code of Civil Procedure section 425.16[1] (the anti-SLAPP statute). The complaint states three causes of action for workplace retaliation and one cause of action for violation of the Public Safety Officers Procedural Bill of Rights (Gov. Code, § 300 et seq.).

The plaintiff, Mark Armendariz, was formerly employed as a police officer by the City. Armendariz alleges the City's police department (department) made false statements about his work performance, subjected him to an unwarranted internal affairs investigation, and ultimately terminated his employment in retaliation for his public criticism of department policies and hiring decisions. In its anti-SLAPP motion, the City asserted the internal affairs investigation constituted an official proceeding authorized by law and, therefore, statements made in connection with the investigation are protected under the anti-SLAPP statute. The City further argued all its subsequent conduct predicated on the results of the investigation, including the alleged wrongful employment termination, is also protected activity.

We conclude that although certain of Armendariz's retaliation claims are predicated on activity that is protected by the anti-SLAPP statute, he has shown a probability of success on the merits of those claims. Because the City failed to discuss the trial court's ruling on Armendariz's fourth cause of action, it has

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[1] All further undesignated section references are to the Code of Civil Procedure.

waived any appellate challenge to that portion of the court's order. Accordingly, we affirm the court's order denying the City's anti-SLAPP motion in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

Armendariz worked for the Burbank Police Department from late 2002 until the department terminated his employment in July 2013. Following his termination, Armendariz filed a complaint against the City asserting four causes of action: whistleblower retaliation in violation of Labor Code section 1102.5; political retaliation in violation of Labor Code sections 1101 and 1102, and Government Code section 3302; retaliation in violation of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.); and violation of the Public Safety Officers Procedural Bill of Rights (Gov. Code, § 3300 et seq.).

According to the complaint, Armendariz was a member of the Burbank Police Officers' Association (association), the officers' collective bargaining union, throughout his employment with the department. Armendariz served as a patrol representative in 2010, and then served as the president of the association from January 2011 until his employment termination in July 2013. Armendariz alleged that while he held leadership positions in the association, he openly criticized the department's leadership decisions, "including, *inter alia*, scheduling and staffing decisions by Department management, imprecise disciplinary standards, the extension of temporary contracts of Department captains, [and] the fact that [Police Chief Scott] LaChasse was politically appointed [to] the permanent Chief position in June 2013 without use of an appropriate selection process." As a consequence, Armendariz claimed, the department retaliated against him by giving him poor work performance evaluations, subjecting him to

"unfounded charges and internal affairs investigations," "excessive suspensions," and "involuntary leave," and, eventually, terminating his employment with the department.

The City filed a special motion to strike the complaint as a strategic lawsuit against public participation (anti-SLAPP motion) under section 425.16. The City asserted the department terminated Armendariz after an internal affairs investigation revealed that on six separate occasions between March 1, 2012 and June 10, 2012, Armendariz failed to take a police report from a crime victim, in violation of department policy. According to the City, the department initiated the investigation after a citizen lodged a complaint with the department, alleging Armendariz responded to her call to the department but refused to take a police report from her, stating it was against department policy for him to do so under the circumstances. The City argued that the complaint should be stricken because the department's internal affairs investigation was protected First Amendment activity, i.e., an "official proceeding authorized by law," within the meaning of section 425.16, subdivision (e)(1) and (2). The City further asserted that Armendariz would be unable to show a probability of prevailing on the merits of his claims because the City terminated Armendariz due to his poor job performance, which was well documented.

The trial court denied the City's anti-SLAPP motion, concluding that the focus of Armendariz's complaint was the wrongful termination of his employment, rather than the written or oral statements made in connection with the internal affairs investigation, which would be protected by the anti-SLAPP statute. The court also ruled that each of the City's affirmative defenses fails as a matter of law. The City timely appeals.

CONTENTIONS

The City contends the court erred by denying its anti-SLAPP motion. With respect to the first prong of the anti-SLAPP analysis, the City contends its internal affairs investigation is protected activity within the meaning of section 425.16, subdivision (e)(1) and (2). As to the second prong, the City contends Armendariz cannot demonstrate a probability of success on his retaliation claims because (a) it fired Armendariz due to his poor job performance, which is well-documented; (b) Armendariz's complaint is barred as a matter of law because he failed to exhaust his administrative and judicial remedies; (c) it is immune from liability under Government Code sections 820.2, 821.6 and 815.2; and (d) the conduct underlying the complaint was privileged litigation activity protected under Civil Code section 47.[2]

DISCUSSION

A. Standard of Review.

We review an order granting or denying an anti-SLAPP motion de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) We consider the "pleadings, and supporting

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[2] The City's anti-SLAPP motion sought to strike all four causes of action. Although the trial court denied the motion in its entirety, the City has not challenged on appeal the court's ruling on the fourth cause of action for violation of Government Code section 3500 et seq., and has therefore waived the argument. (See, e.g., *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 ["Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived"]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["Issues not raised in an appellant's brief are deemed waived or abandoned"].)

and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We do not "weigh evidence or resolve conflicting factual claims. [Our] inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. [We] accept[ ] the plaintiff's evidence as true, and evaluate[ ] the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385 (*Baral*).)[3]

B. Legal principles regarding section 425.16.

Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

In *Baral,* the Supreme Court reiterated the purpose and scope of the anti-SLAPP statute, noting that it "does not insulate

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[3] After we heard oral argument in this matter, the Supreme Court published *Baral v. Schnitt* (2016) 1 Cal.5th 376, a case addressing the proper analysis of a so-called "mixed cause of action" for purposes of the anti-SLAPP statute. In addition, three days before the Supreme Court issued that opinion, the Court of Appeal for the Third District issued a published opinion, *Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176, considering the application of the anti-SLAPP statute in the wrongful employment termination context. We requested and received supplemental briefing from the parties regarding these two recent published decisions.

defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral, supra*, 1 Cal.5th at p. 384.) So long as the plaintiff can establish that a claim has minimal merit, it may proceed. (*Ibid.*)

Importantly for our purposes, the Court also discussed the analysis courts should use when presented with a mixed cause of action, i.e., a cause of action that, as pleaded, includes allegations of both protected and unprotected activity. Prior to *Baral*, the courts of appeal had taken different approaches to the issue. Some followed the long-standing *Mann* rule,[4] which allowed a plaintiff to survive an anti-SLAPP motion by proving that any portion of a mixed cause of action had merit. (*Baral, supra*, 1 Cal.5th at pp. 385-386.) In other words, a plaintiff could go forward with a cause of action that contained meritless allegations implicating protected First Amendment activity, so long as the plaintiff could prove that other allegations gave rise to a viable claim for recovery—even if those allegations only implicated non-protected activity. (*Ibid.*) As other courts of appeal noted, however, this approach led to anomalous results and conflicted with the "guiding principle in applying the

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[4] *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90.

anti-SLAPP statute[, which] is that 'a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.' " (*Id.* at p. 387.)

Agreeing with the latter view, the Court recently held that section 425.16 uses the phrase "cause of action" in a specific way, to mean "*allegations of protected activity that are asserted as grounds for relief*." (*Baral, supra*, 1 Cal.5th at p. 395.) In other words, the Court noted, a single cause of action may, as pleaded, contain multiple claims by the plaintiff, each based upon the same legal theory but premised upon different activity by the defendant. (*Id.* at pp. 381-382.) The Court clarified that, under the anti-SLAPP statute, a defendant need not seek to strike a cause of action in its entirety, but may instead target only those specific allegations of protected activity which form the basis of a claim for relief, while leaving intact other claims based upon unprotected activity within the same cause of action. (*Id.* at p. 395.) The Court also reaffirmed that alleged activity which is merely collateral to the plaintiff's claims is not subject to the anti-SLAPP statute. (*Id.* at p. 394.)

C. The First Prong: Protected Activity

Section 425.16 provides that an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any

written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

With respect to the first step of the analysis, "the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage." (*Baral, supra*, 1 Cal.5th at p. 396.) Our examination of the complaint reveals that Armendariz's retaliations claims contain some allegations relating to protected activity. As the City points out, the department's internal affairs investigation was an "official proceeding authorized by law" within the meaning of the anti-SLAPP statute. (See, e.g., *Hansen v. Dept. of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 (*Hansen*) [observing that a law enforcement internal affairs investigation is an "official proceeding authorized by law" within the meaning of the anti-SLAPP statute].) Accordingly, the department's act of conducting an internal affairs investigation, as well as statements or writings generated in connection with that investigation, are protected activity within the meaning of the anti-SLAPP statute. (*Ibid.* [holding that allegedly false statements made by officers in connection with the investigation constituted protected activity under section 425.16, subdivision (e)(2)].) Armendariz's complaint directly implicates this type of protected activity, inasmuch as he alleges as to all three retaliation claims: "Defendants, and each of them, retaliated

against Plaintiff . . . [by]: (1) knowingly making false, misleading or malicious statements regarding Plaintiff which were reasonably calculated to harm or destroy the reputation, authority or official standing of Plaintiff; (2) making false and unfounded complaints regarding Plaintiff's work performance; (3) charging Plaintiff with false allegations of misconduct; (4) wrongfully fabricating charges of misconduct and instituting baseless internal affairs ('IA') investigations against Plaintiff . . . . "

Armendariz urges that the anti-SLAPP statute should not apply in the first instance because the primary focus of his complaint is the City's termination of his employment, as well as other alleged wrongful acts such as imposing excessive suspensions and placing him on involuntary leave, which are not protected activity in furtherance of the City's First Amendment rights. (See *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 180 ["No employer action has any effect unless it is communicated, but no one would suggest that a statement or writing firing an employee is protected First Amendment activity"].) However, as we have said, the court must examine each of Armendariz's claims and determine whether any of them is based upon protected activity.

Armendariz also argues that "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." Armendariz cites several cases for that proposition, including *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, a case in which the plaintiff filed a lawsuit in state court immediately after the defendant filed a lawsuit in federal court, and the state court action was filed in an attempt to gain a more favorable forum for the litigation. (*Id.* at pp. 72-73.) In

analyzing whether the trial court properly granted the defendant's anti-SLAPP motion, the Supreme Court disagreed with the trial court and concluded the plaintiff's state court action did not actually "arise out of" the defendant's protected act of filing the federal suit. (*Id.* at pp. 76-77.) Instead, the Court held, the state court action arose out of the substantive dispute between the parties about the constitutionality of an ordinance. (*Ibid.*) The mere fact that the federal suit triggered the plaintiff's action was insufficient to establish that the plaintiff's action "arose out of" the federal suit.

While we agree that many cases have emphasized the point that temporal proximity does not necessarily establish that a lawsuit arises out of the conduct immediately preceding it, we do not find that principle of assistance here. Armendariz filed his action after the City terminated his employment which, as we have explained, is not activity protected by the anti-SLAPP statute.

In sum, several of Armendariz's retaliation claims contain allegations relating to the City's protected First Amendment activity. We therefore proceed to the second prong of the anti-SLAPP analysis with respect to those claims.

D. The Second Prong: Minimal Merit

1. Retaliation Claims

Because we have concluded that some of plaintiff's claims are predicated upon protected conduct, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral, supra*, 51 Cal.5th at p. 396.) Accordingly, "without resolving evidentiary conflicts, [we] must determine

whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Ibid.*) "The plaintiff's burden on what the Supreme Court has referred to as the 'minimal merit' prong of section 425.16, subdivision (b)(1) (*Navellier v. Sletten* [2002] 29 Cal.4th [82], 95, fn. 11) has been likened to that in opposing a motion for nonsuit or a motion for summary judgment. [Citation.] 'A plaintiff is not required "to *prove* the specified claim to the trial court"; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim. [Citation.]' [Citation.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675 (*Peregrine Funding*).)

Before we proceed to our analysis of the second prong, we address the briefing submitted by the City in this appeal. Attorneys appearing in the appellate courts are presumed to be aware of several basic principles of appellate practice: The judgment of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) As a consequence of this presumption of correctness, error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, an appellant must demonstrate prejudicial or reversible error based on sufficient legal argument supported by citation to an adequate record. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557.)

"[A]n appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655-656.)

Although the analysis of the merit of the plaintiff's claims in an anti-SLAPP case is typically a lengthy, fact-intensive endeavor, in this appeal the City devotes a single paragraph[5] to its discussion of the merit of Armendariz's retaliation claims. The City fails to discuss (or even acknowledge) the evidence submitted by Armendariz in opposition to the City's anti-SLAPP motion, which includes several declarations and comprises more than 220 pages. Further, the City fails to support its factual assertions with citations to the record, and fails to provide either relevant legal authority or cogent analysis to support its position. In short, the City offers bare argument. In accordance with the appellate law principles just stated, we could conclude the City failed to meet its burden to demonstrate error and affirm the court's ruling without further discussion. However, because the City's arguments are easily refuted, we address them briefly.

Armendariz asserts three retaliation claims based on distinct statutory provisions—Labor Code section 1102.5 (whistleblower), Labor Code sections 1101, 1102 and Government Code section 3302 (political activity), and Government Code section 3500 et seq. (Meyers-Milias-Brown Act). Although the

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[5] The City repeats the identical paragraph a second time, later in the brief.

specific conduct protected by each of these statutes differs,[6] the essential elements of a retaliation claim are well settled: To establish a prima facie case of retaliation, a plaintiff must show (1) he engaged in a protected activity, (2) the employer subjected him to an adverse employment action, and (3) there is a causal link between the two. If the plaintiff meets his prima facie burden, the defendant has the burden to prove a legitimate, nonretaliatory explanation for its actions. To prevail, the plaintiff must show the explanation is a pretext for the retaliation. (See, e.g., *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1540 [stating legal requirements for whistleblower retaliation lawsuit brought under Labor Code section 1102.5].)

The evidence submitted by Armendariz establishes that from approximately 2006 to 2013, Armendariz believed the department was imposing arrest and citation quotas on its officers, in violation of Vehicle Code sections 41600 and 41602. In 2009 and 2010, Armendariz complained about the department's policy to his immediate supervisor and advised several other

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[6] An employee engages in protected activity under section 1102.5, subdivision (b) when he or she discloses a reasonably based suspicion of illegal activity to a governmental agency or other tribunal. (Lab. Code, § 1102.5, subd. (b).) Under Labor Code sections 1101 and 1102, protected activity includes participating in politics, becoming a candidate for public office, or otherwise engaging in political activities or affiliations. (Lab. Code, § 1101.) Under the Meyers-Milias-Brown Act, protected activity includes participating in collective bargaining and other public employee-employer relations issues. (Gov. Code, § 3506.5 [prohibiting retaliation]; § 3502 [giving public employees the right to "form, join and participating in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations"].)

officers in the department about his concerns. Also in 2010, Armendariz complained about the department's policy to Scott LaChasse, the interim Chief of Police.

Armendariz's criticism of the department escalated during 2012. During the last few years of his employment with the department, Armendariz held leadership positions in the Burbank Police Officers' Association. In that capacity, Armendariz repeatedly and publicly criticized LaChasse's management of the department and claimed his managerial decisions placed the safety of the City's residents at risk. In addition to challenging the department's use of quotas, Armendariz vocally opposed new disciplinary guidelines adopted by LaChasse. Throughout 2012, Armendariz also publicly complained to the City's civil service board that LaChasse hired officers from outside the department to occupy senior positions within the department, without complying with appropriate civil service hiring protocols. Armendariz alerted officers in the association to his concerns and made public statements to the press.

In March 2012, Armendariz became the subject of an internal affairs investigation based upon a minor incident in which Armendariz, while on patrol, damaged the tires and rims on his patrol car. The investigation concluded that although Armendariz informally reported the incident, he failed to comply with the department's formal procedure for reporting such damage. As a result, Armendariz received a two-day suspension, which was reduced to one day after Armendariz appealed the department's disciplinary action.

In October 2012, just after Armendariz spoke to the media criticizing LaChasse's hiring decisions, Armendariz became the

subject of a second internal affairs investigation. The department's investigation focused on Armendariz's purported failure to file a police report after a citizen requested that he do so. The department expanded the investigation and in May 2013, the department issued a report concluding that on seven occasions in early 2012, Armendariz improperly refused to file a police report regarding a citizen complaint.

On June 4, 2013, LaChasse was sworn in as the permanent Chief of Police. Two days later, on June 6, 2013, Armendariz received a notice of proposed termination from LaChasse. This evidence, particularly the fact that the department's investigations coincided with Armendariz's public criticisms of the department and LaChasse, together with the fact LaChasse issued the notice of proposed termination immediately after he was appointed as the permanent chief of police, is sufficient to shift the burden to the City regarding its motivation for the employment termination.

The City contends it had a legitimate, nonretaliatory motive for terminating Armendariz's employment. Specifically, the City claims the department terminated Armendariz because, on multiple occasions, Armendariz failed to conduct a proper investigation of citizen complaints, failed to take a police report, and misrepresented department policy to citizens. As we have already said, the City fails to provide a detailed analysis of its evidence, and it entirely ignores the evidence submitted by Armendariz. By way of example, the City asserts Armendariz lied during the internal investigation, based upon a declaration of the investigating officer who stated that statements made by Armendariz during the internal affairs investigation were contradicted by statements provided to the department by

citizens. However, Armendariz responded with contrary evidence to support his version of the events at issue—evidence the City does not address.

Based upon our independent review of the evidence submitted by the parties, we conclude Armendariz offered sufficient evidence to establish that his claims have the minimal merit required to defeat an anti-SLAPP motion.

2. The City's Affirmative Defenses

The City also contends that even if Armendariz could establish a probability of prevailing on the merits of his retaliation claims, those claims are barred on several different grounds as a matter of law. In the anti-SLAPP context, "although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense." (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 676.) We reject each of the City's affirmative defenses.

a. Exhaustion of Administrative Remedies

The City first argues the complaint is barred because Armendariz failed to exhaust his administrative and judicial remedies. However, we decline to consider this argument because the City failed to raise it in its anti-SLAPP motion. (See, e.g., *Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977, 988 [noting issues not raised in the trial court cannot generally be raised on appeal].)

b. Governmental Immunity

The City next asserts that, as a governmental entity, it is immune from liability on all Armendariz's causes of action under Government Code sections 820.2, 821.6, and 815.2.

Government Code section 820.2 provides that "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, § 820.2.) Similarly, Government Code section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." (Gov. Code, § 821.6.) These provisions immunize governmental employees from personal liability for acts performed within the course and scope of their authority.

The City argues that these provisions, together with Government Code section 815.2, immunize it from liability on Armendariz's retaliation claims. That section provides: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Gov. Code, § 815.2.) This statute imposes upon public entities vicarious liability for the tortious acts and omissions of their

employees, and makes it clear that in the absence of statute, a public entity cannot be held liable for an employee's act or omission where the employee himself or herself would be immune. (Legis. Comm. Com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 815.2, p. 179.)

These provisions do not aid the City here. Government Code section 815.2, subdivision (b), relates to the imposition of *vicarious* liability upon a public entity. But Armendariz does not seek to hold the City vicariously liable for the actions of its employees. Rather, he seeks to hold the City *directly* liable under the specified sections of the Labor Code and the Government Code. In that circumstance, a public employee's personal immunity from suit does not accrue to the benefit of the public entity itself, which has an independent statutory obligation to its employees, not subject to governmental immunity. (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989 fn. 9 [noting that even though school district board members were immune from liability under FEHA and therefore Government Code section 815.2 precluded holding the district vicariously liable for the members' actions, the district was still potentially subject to direct liability for its actions as an "employer" under FEHA]; see also *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1014 ["Public entities may be directly liable to sexually harassed employees for compensatory damages in civil actions under the FEHA"]; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1424 [holding Government Code section 821.6 did not provide immunity from wrongful termination/whistleblower suit brought under former Government Code section 19683]; *Southern Cal. Rapid. Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 726 [holding Government Code, section 820.2 did not provide

immunity from whistleblower/retaliation suit brought under Government Code, section 12653].)

c. Litigation Privilege

Finally, the City argues Armendariz's retaliation claims are barred by the litigation privilege, which precludes liability arising from a publication or broadcast made in a judicial proceeding or other official proceeding. (Civ. Code, § 47, subd. (b).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Thus, communications with "some relation" to judicial or other proceedings are "absolutely immune from tort liability" by the litigation privilege. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) The privilege is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. (*Id.* at pp. 1194-1195 [privilege applies to pre-litigation communications]; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048 [privilege extends to protect attorney's post-judgment execution efforts].)

Because the litigation privilege protects only publications and communications, a "threshold issue in determining the applicability" of the privilege is whether the defendant's conduct was communicative or noncommunicative. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 211.) Here, the City contends, correctly, that its internal affairs investigation was an "official proceeding authorized by law" within the meaning of Civil Code section 47, subdivision (b). Accordingly, any communications made during

or in connection with the investigation are immune from liability. (See, e.g., *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 617 [litigation privilege barred retaliation claim predicated upon employer's internal investigation and written report].) However, as we have already explained in our analysis of the first prong, Armendariz's retaliation claims not only target communicative conduct such as making false or misleading statements during the course of the investigation, but they also challenge the City's denial of promotional opportunities, the imposition of a suspension, and the termination of his employment, none of which constitutes communicative conduct subject to the litigation privilege. Because at least a portion of the retaliation claims are not subject to the litigation privilege, the City fails to carry its burden to show it would prevail on this affirmative defense.

DISPOSITION

The order denying the City's anti-SLAPP motion is affirmed. Plaintiff and respondent Mark Armendariz shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J. ALDRICH, J.